STATE OF MICHIGAN

COURT OF APPEALS

SANDRA J. ZEMAITIS, Personal Representative of the Estate of JAMES CARL ZEMAITIS, Plaintiff-Appellant,	UNPUBLISHED April 6, 2006
v	No. 265698 Kent Circuit Court
SPECTRUM HEALTH and ROBERT LANG, M.D., Defendants-Appellees.	LC No. 03-011860-NH

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants in this medical malpractice action in which the court determined that plaintiff had failed to comply with MCL 600.2912d(1)(d) by not submitting a legally sound affidavit of merit relative to the element of proximate cause. Raising multiple arguments under MCL 600.2912d(1), defendants first challenged the affidavits submitted by plaintiff approximately 18 months into the litigation, at which time the period of limitations had elapsed on plaintiff's cause of action. We reverse, holding that Dr. Petersen's affidavit of merit sufficiently set forth a statement of proximate cause as required by MCL 600.2912d(1)(d) and otherwise complied with MCL 600.2912d(1).

Plaintiff, as personal representative of her adult son's estate, alleged that defendant Dr. Lang failed to properly identify, diagnose, and treat a skin lesion on her son's back, and failed to make a referral to a specialist in regard to the lesion, with defendant doctor opining that it was a sebaceous cyst, but which was in actuality a sarcoma[1] that metastasized and caused James Zemaitis's premature death at age 23. Defendant Lang is board certified in both internal medicine and pediatrics, and plaintiff filed three affidavits of merit in pursuing the lawsuit, one from Dr. Schubiner, who is a board certified specialist in internal medicine and pediatrics, and which affidavit addressed the standard of care and the manner in which it was breached. The second affidavit of merit was from Dr. Petersen, who is a board certified specialist in general

[1] Specifically, plaintiff claimed that the sarcoma or cancer was a malignant fibrous histiocytoma.

surgery, with a practice concentrating in surgical oncology, and this affidavit focused on proximate cause. A few days after the complaint was filed, plaintiff filed the third affidavit of merit. This affidavit was from Dr. Pion, who is a board certified specialist in dermatology, and his affidavit also focused on causation.

The trial court summarily dismissed the action with prejudice when defendants successfully challenged the affidavits. The court found that Dr. Pion's affidavit was defective because it did not indicate that the doctor had reviewed the notice of intent as required by § 2912d(1), and the court found that Dr. Petersen's affidavit, standing on its own, was inadequate with respect to proximate cause. The trial court ruled that Dr. Pion's affidavit was needed to bridge a perceived gap between the alleged breach of care and the injury, such that the causation requirement of § 2912d(1)(d), which was partially satisfied by Dr. Petersen's averments on causation, became fully satisfied. Because the court had found that Dr. Pion's affidavit could not be considered, that Dr. Petersen's affidavit in itself was insufficient to establish causation, and that Dr. Schubiner's affidavit did not address causation, the court dismissed the case with prejudice, considering that the period of limitations had expired by this time.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Similarly, an issue posing a question of statutory construction is reviewed de novo. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id*. at 549. In discerning legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id*. We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id*. This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Bageris v Brandon Twp*, 264 Mich App 156, 162; 691 NW2d 459 (2004). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Shinholster*, *supra* at 549 (citation omitted). Where the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Id.* "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002)(citation omitted).

MCL 600.2912d(1) provides that in medical malpractice actions, a plaintiff or the plaintiff's attorney "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]." Subsection (1) of § 2912d further provides:

> [T]he affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.

(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

We find it unnecessary to determine whether Dr. Pion's affidavit of merit was statutorily compliant or whether the affidavit can be amended and relate back to the complaint, where Dr. Petersen's affidavit of merit complied with § 2912d(1) and set forth an adequate statement regarding proximate cause.

Dr. Petersen's and Dr. Schubiner's affidavits indicate that their opinions are based, in part, on the medical records they had reviewed. The affidavits do not expressly provide that the affiant had reviewed "all medical records supplied to him . . . by the plaintiff's attorney concerning the allegations contained in the notice[.]" MCL 600.2912d(1). However, the trial court found, despite some variances from the wording of the statute, that the affidavits sufficiently satisfied the statutory requirements relative to review of medical records. Defendants argue that the discrepancy between the statutory language and the language in the affidavits provides this Court with an alternative basis to affirm the trial court. While Dr. Schubiner's and Dr. Petersen's affidavits state that their opinions are based on the medical records they reviewed, the affidavits also mention that each doctor reserved the right to amend "after reading *any other materials submitted to me*." This language indicates that the doctors had reviewed all of the medical records submitted to them up to that point. And those records necessarily came from plaintiff or plaintiff's counsel. Indeed, it is difficult to conceive of a source of the medical records other than plaintiff or plaintiff's counsel. Although the affidavits do not quote verbatim the language of the statute, they sufficiently convey that the affiants had reviewed all of the medical records provided to them by plaintiff, and thus the affidavits were conforming with respect to this particular issue. We find no error in the trial court's ruling.

On the issue of causation, we first note that Dr. Schubiner's affidavit addresses solely the elements regarding the applicable standard of care, how a doctor could comply with the standard, and the manner in which Dr. Lang breached the standard. With respect to Dr. Pion's affidavit, we shall proceed on the assumption that it is defective. This leaves Dr. Petersen's affidavit of merit to satisfy the proximate cause element. Dr. Petersen averred as follows:

1. I am a board-certified specialist in General Surgery and am licensed as a physician in the State of New York. My practice concentrates in Surgical Oncology.

2. All of the opinions expressed in this Affidavit are based on the medical records that I have reviewed, in addition to my experience, training and knowledge of the medicine and surgery involved. I reserve the right to amend

and supplement my opinions after reading any other materials submitted to me. I have also reviewed the Notice of Intent as required by Michigan law.

3. The lesion on Mr. James Zemaitis' back, characterized as a "sebaceous cyst" by Dr. Lang on August 2, 2001, was actually a sarcoma.

4. If this lesion had been biopsied in August 2001, the diagnosis of Mr. Zemaitis' sarcoma would have been made at that time.

5. If the sarcoma was diagnosed and treated prior to metastasis to Mr. Zemaitis' lymph nodes, it is more likely than not that his disease would have been successfully treated and that he would have survived.

6. It is likely that the sarcoma had not metastasized to Mr. Zemaitis' lymph nodes by June 6, 2002 or at any time previously.

Defendants argue that the affidavit lacks sufficient detail and fails to make the necessary link between the breach of the standard of care and the injury, all as required by § 2912d(1)(d). We disagree.

The question, as we view it, is whether § 2912d(1)(d) needs the level of specificity suggested by the trial court and defendants such that Dr. Petersen's affidavit cannot stand on its own and satisfy the causation element of the statute.

MCL 600.2912d(1) merely requires that there be a "statement" of "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." Dr. Schubiner opined that Dr. Lang breached the standard of care by failing to describe the appearance of the lesion at the August 2001 examination, failing to refer James Zemaitis ("James") to a dermatologist at that time, and by misdiagnosing the lesion as a sebaceous cyst. Dr. Petersen's affidavit indicated that had the proper diagnosis been made in August 2001, the sarcoma would likely have not metastasized to James' lymph nodes and more likely than not James would have survived. The affidavit reflects that, by Dr. Lang misdiagnosing the lesion, the sarcoma was able to metastasize to the point where it could not be successfully treated when eventually discovered. We conclude that this "statement" by Dr. Petersen satisfied the proximate cause element of § 2912d(1)(d). It is clear from Dr. Petersen's affidavit that he was of the opinion that the lesion should have been biopsied in 2001. We also note that the failure to refer James to a dermatologist was but one of three alleged breaches of the standard of care; therefore, having a dermatologist opine that a biopsy would have been done is relevant only to that alleged breach, and not necessarily the breach relative to misdiagnosing the lesion. Moreover, § 2912d(1)(d) only requires the affidavit to address the "manner in which" the breach proximately caused the alleged injury, which is comparable to addressing "how" the breach caused the injury. Dr. Petersen's affidavit states "how" by asserting that the misdiagnosis allowed the untreated sarcoma to metastasize to James' lymph nodes resulting in his death. No more detail is necessary.

MCL 600.2912d(1) does not provide that the "statement" needs to be detailed or elaborate. A helpful analogy is to examine MCL 600.2912b, which addresses notices of intent, and which requires that the notice contain a "statement" of "[t]he manner in which it is alleged

the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." § 2912b(4)(e). This language closely parallels MCL 600.2912d(1)(d). Our Supreme Court in *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 699; 684 NW2d 711 (2004), addressed, in part, the issue of whether the plaintiff's notice had contained a "statement" sufficient to meet the required "proximate cause" element of the notice of intent statute. The Supreme Court, rejecting this Court's analysis, stated:

> We disagree with the assertion that plaintiff "clearly state[d]" that a misdiagnosis by any of the defendants resulted in her fallopian tube bursting and in her ensuing sterility. *Nowhere in the notices does plaintiff state that any of the defendants misdiagnosed her condition; nor do the notices state any consequences stemming from a misdiagnosis*. Indeed, the reader is left to wonder whether plaintiff is alleging that a diagnosis of ectopic pregnancy could have been made in time to avoid the rupture of her "tube," or whether she is alleging that her tube ruptured as a direct result of her treatment by defendants[.] [*Id.* (alteration in original; emphasis added).]

Here, the affidavits stated that there was a misdiagnosis and set forth the consequences stemming from the misdiagnosis. In discussing the sufficiency of statements in general under the notice of intent statute, § 2912b, the *Roberts* Court ruled:

> Under MCL 600.2912b(4), a medical malpractice claimant is required to provide potential defendants with notice that includes a "statement" of each of the statutorily enumerated categories of information. Although it is reasonable to expect that some of the particulars of the information supplied by the claimant will evolve as discovery and litigation proceed, the claimant is required to make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings. The information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them. This is not an onerous task: all the claimant must do is specify what it is that she is *claiming* under each of the enumerated categories in § 2912b(4). Although there is no one method or format in which a claimant must set forth the required information, that information must, nevertheless, be specifically identified in an ascertainable manner within the notice. [*Roberts, supra*, 470 Mich at 700-701 (emphasis in original).]

The affidavit of merit stage of the proceedings is at the inception of the litigation, and there likewise has been no discovery; therefore, the information available and to be communicated is also somewhat limited. See *Grossman v Brown*, 470 Mich 593, 598-600; 685 NW2d 198 (2004). The averments by Dr. Petersen are responsive to the information sought by § 2912d(1)(d) on the element of proximate cause, and they are as particularized as is consistent with the early stage of the proceedings. Dr. Petersen's affidavit of merit clearly put defendants on notice that he was opining that the misdiagnosis allowed the sarcoma to metastasize to the point where James' chance of survival was unlikely when treatment was belatedly initiated. As opposed to the scenario in *Roberts*, Dr. Petersen's affidavit conveyed the consequences of Dr. Lang's alleged misdiagnosis.

Defendants argue that there are six causal links that needed to be established. According to defendants, assuming compliance with the alleged standard of care and assuming referral to a dermatologist was made by Dr. Lang in August 2001, plaintiff needed to aver via the affidavits: (1) that James would actually have gone to the dermatologist before metastasis, (2) that the dermatologist would have ordered a biopsy before metastasis, (3) that a biopsy would have actually been performed before metastasis, (4) that the sarcoma would then have been diagnosed before metastasis, (5) that this would have led to treatment before metastasis, and (6) that treatment would have led to long-term survival. The clear language of MCL 600. 2912d(1)(d) does not require such in-depth, step-by-step averments on proximate cause. Additionally, Dr. Petersen's affidavit encompassed, although in a more general fashion, most of the six causal links cited by defendants, especially considering his opinion that the sarcoma had likely not metastasized by June 6, 2002.

Defendants also argue that the affidavits do not assert that James' chances of survival would have increased by at least 51% had Dr. Lang satisfied the alleged standard of care. MCL 600.2912a(2) provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. *In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.* [Emphasis added.]

In *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002), this Court construed MCL 600.2912a(2). The *Fulton* panel held that a medical malpractice patient seeking recovery for loss of an opportunity to survive must show that the alleged malpractice reduced the opportunity by more than 50%. *Id.* at 83. Applying this interpretation to the facts of the case, the Court ruled:

> In this case, plaintiff's expert stated that Fulton's initial opportunity to survive was eighty-five percent and that her opportunity to survive after the alleged malpractice was sixty to sixty-five percent. Therefore, because her loss of opportunity due to defendants' alleged malpractice was not greater than fifty percent, we hold that the trial court erred in denying defendants' motion for summary disposition. [*Id.* at 84.]

Assuming the analysis applies here in the context of affidavits of merit, one would have to determine the percentage relative to James' opportunity to survive in August 2001 with proper treatment, and then measure it against his opportunity to survive after the alleged malpractice. If the difference or reduced opportunity to survive was greater than 50%, recovery would be allowable, assuming the other elements of the cause of action were established. Dr. Petersen's affidavit is not that detailed on causation, and specific percentages are not bandied about. However, Dr. Petersen asserted that it was "more likely than not" that James would have survived if the sarcoma was timely diagnosed. The phrase "more likely than not" necessarily suggests a percentage above 50%. It is also evident from the affidavit that James' chances of survival after the sarcoma metastasized to his lymph nodes were nil; therefore, the malpractice decreased his opportunity to live by more than 50%.

Furthermore, nothing in the language of § 2912d(1)(d) suggests the need to specify the percentage calculations made under § 2912a(2). We also note that § 2912a(2) speaks in terms of "the burden of proving," which would relate to the evidence produced at a trial and not to affidavits of merit. We conclude that Dr. Petersen's affidavit of merit sufficiently set forth a statement of proximate cause as required by MCL 600.2912d(1)(d).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter